

State of New Hampshire



PERSONNEL APPEALS BOARD

54 Regional Drive, Unit 5
Concord, New Hampshire 03301

STATE OF NEW HAMPSHIRE

PERSONNEL APPEALS BOARD

MICHAEL FEINAUER

V.

NEW HAMPSHIRE DEPARTMENT OF SAFETY – DIVISION OF STATE POLICE

2018-T-010

APPEARANCES:

Attorneys John Krupski and Marc Beaudoin represented the Appellant; Attorneys Mary Maloney from the N.H. Department of Safety and Emily Goering from the N.H. Department of Justice represented the State.

ISSUE OF LAW:

The parties dispute whether the appellant lied to state officials during the course of an investigation about his role and status in a family trust in violation of the integrity provisions of the agency's Professional Standards of Conduct, Chapter 1, Section 1.4.0 Obligations, Subsection 1.4.3 Integrity, Section 1.11.0 Personal Conduct, Subsection 1.11.2 Personal Behavior, Per 1002.08 (b)(5) and whether he also violated the following policies: Theft of Valuable Good or Services, Per 1002.08 (b)(7) Violation of a Posted or Published Agency Policy, Per 1002.08 (b)(10) Obstructing an Internal Investigation, and Per 1002.08 (b)(26) Repeated Unauthorized use or gross misuse of Information or Communications Systems.

WITNESSES: Michael Feinauer, Appellant;

Richard Tracy, Chief Investigator, Civil Bureau, NH Department of Justice;
Attorney Lisa Wolford, Criminal Bureau, NH Department of Justice;
Attorney Dorcas Gordon, Grantor's trust and estate attorney;

Lieutenant John Mullen – Professional Standards Unit – Division State Police
Attorney Eric Wilson, Appellant’s counsel during the investigation;
Luca D’Italia – Financial Adviser at Franklin Savings Bank;
Colonel Christopher Wagner - Director, Division of State Police; and
Trooper Nicole Armeganian, Commander of Troop G.

APPEAL HEARING: The Board conducted a recorded and in-person hearing at the offices of the N.H. Division of Personnel in Concord, N.H. on August 5, 2020 and August 6, 2020, recessed the hearing until August 12, 2020 for deliberations and closed the record later that day.

APPEAL TRIBUNAL: Four commissioners served on the tribunal each day and constituted a quorum: Attorney Jason Major, Marilee Nihan, Gail Wilson and Attorney Norman Patenaude who presided at the hearing.

BACKGROUND

The N.H. Department of Safety, Division of State Police dismissed the appellant on January 11, 2018 for violating the integrity clause in its standards of professional conduct. He disagreed with that determination and requested a hearing to adjudicate the issue.

FINDINGS OF FACT

The N.H. Department of Safety - Division of State Police (“DOS”) hired the appellant in December 2004. His essential job duties were to enforce criminal, motor vehicle and other state laws and rules and to successfully prosecute cases in courts and in administrative settings.

The appellant’s aunt, Marcia W. Gamache, executed the 11th Amendment to the 2002 Marcia W. Gamache Revocable Trust on December 17, 2014 after returning from Florida to live in New Hampshire. She also transferred her funds from Bank of America to a local bank, Meredith Village Savings Bank (“Meredith Village”) for her convenience. At that time, she was the trustee and the appellant was the successor trustee in the event of her incapacity, death or resignation pursuant to the provisions of Article 5 of the Trust Agreement. The appellant was the sole beneficiary of Ms. Gamache’s estate and held a Durable Power of Attorney (“POA”) over her assets in the event of her death or incapacity. Ms. Gamache was a widow and childless.

In 2013, Ms. Gamache moved to Taylor Community, a retirement community in Laconia. The trust assets funded a checking account held jointly by her and the appellant and the bank automatically paid her routine monthly bills from that account. The appellant was the only relative who looked after her and provided care to her. She set up the joint checking account funded by the trust investments at Meredith Village for her own use as well as for the appellant’s reasonable discretionary use.

In November 2014, the appellant contacted estate planning attorney Dorcas Gordon to create an estate plan for himself and his spouse. In an email to Attorney Gordon dated November 28, 2014, the appellant provided Ms. Gamache's life history, informed her that Ms. Gamache had established a revocable trust several years earlier, had amended it several times since its creation, that Ms. Gamache wished to make another change to the Trust, and that he would provide Attorney Gordon with a copy of the Trust Agreement. He explained that Ms. Gamache's assets were split between the Trust with its investment funds and a joint checking account with him at a Meredith Village. They scheduled an appointment for the morning of December 4, 2014 for the appellant and his spouse to execute their estate planning documents.

In April 2015, the appellant again contacted Ms. Gordon requesting she meet with Ms. Gamache and him, as Ms. Gamache wished to make another change to her trust. On April 15, in the presence of Ms. Gamache and the appellant, Ms. Gamache resigned as trustee. At this same meeting, the appellant signed a document acknowledging Ms. Gamache's resignation and his immediate role as trustee.

In September 2015, out of concern that there would be insufficient funds to cover her expenses at Taylor Community, an officer at Meredith Village contacted State authorities that deal with elder abuse to complain about the appellant's depletion of funds from the account held jointly by him and his aunt. Soon after, the appellant orchestrated the transfer of Ms. Gamache's funds and trust assets from Meredith Village to Franklin Savings Bank ("Franklin Savings") where he and his spouse already had accounts. He scheduled an appointment with investment specialist Mr. D'Italia at Franklin Savings for September 30, 2015 at which time he brought copies of the 11th Amendment to the Trust Agreement and POA but not the recent change in trustees that took effect on April 15, 2015. With Mr. D'Italia's assistance, the appellant set up the accounts from which the bank would automatically pay Ms. Gamache's routine monthly bills. The Fidelity brokerage account statements were sent to the appellant's home address in Danbury, NH and his email address was listed on the account. The account was set up in October 2015; Ms. Gamache signed off on setting up this account.

In June 2016 Ms. Gamache moved from the independent living section to the assisted living section of Taylor Community and the appellant oversaw the transfer of her belongings and utilities. He also contacted Mr. D'Italia at Franklin Savings about increasing the monthly transfer of funds from the trust to Taylor Community to cover the additional costs.

In July 2016, the appellant and his spouse bought property in Danbury, NH and wired \$110,000 to the seller after paying nearly \$4,000 for land surveying services. These funds came from the joint checking account between Ms. Gamache and the appellant. On July 7, 2016, the investment adviser at Franklin Savings, referring to the trust assets, sent an email to the appellant that read *"we upped the distribution to \$4,600/month and there is enough money for 2-3 months in the account now. As long you or Tracey changed the amount sent to Taylor Community online, that will go next month. The portfolio is yielding about 3%, and on that amount of the assets, you are looking at \$18K/year of income produced. There will need to be*

assets that are sold in order to cover the difference but in the mean time, we are working to make sure the assets are used in the most efficient way possible."

In September 2015, the N.H. Department of Justice ("DOJ") received a complaint from the officer at Meredith Village about possible financial exploitation of his aunt by the appellant. In January 2016 DOJ investigators interviewed the appellant about his fiduciary duties over her trust assets and about his role in the trust. During the interview, he claimed to be unaware that his aunt had resigned as trustee of her trust. During the course of the investigation, several email chains were obtained by the investigators which contradicted that claim. The DOJ found no criminal wrongdoing by the appellant. However, they did conclude that given the amount of evidence of the appellant's involvement as trustee of Ms. Gamache's trust there was no other conclusion that could be drawn other than the appellant lied during the interview regarding his role in the trust. In August 2016, DOJ Attorney Lisa Wolford notified the DOS about the appellant's lack of veracity and recommended his inclusion on the Exculpatory Evidence Schedule ("EES") (formerly known as the "Laurie List" for law enforcement officers with credibility issues).

In August 2016, in response to Attorney Wolford's notification, Lt. John Mullen from the Professional Standards Unit ("PSU") of the DOS opened an internal administrative investigation and asked the appellant for an explanation specific to the issue of the appellant's statement regarding his role as trustee and his aunt's resignation. The appellant provided a written statement in the form of a "yellow letter" in response to Lt. Mullen's request.

In the "yellow letter" to Col. Quinn and Lt. Mullen dated September 8, 2016, the appellant maintained that Ms. Gamache was still the trustee and that he was the successor trustee. He restated what he had told to the DOJ attorneys, *"I had no knowledge then nor do I now that Marcia has resigned as Trustee, nor have I received any documents indicating she resigned as Trustee, leaving me as acting Trustee."* The appellant acknowledged his familiarity with the authority granted to him under a separate Durable Power of Attorney. In his statement the appellant also wrote *"I again restate that to this date I still believe Marcia is the Trustee and I remain the successor Trustee"....Until such time I am notified that I have been named Trustee, I do not believe that I have authority over the Trust."*

The appellant was interviewed on December 21, 2016 by Lt. Mullen at State Police headquarters. Before the start of the interview, the appellant received and signed the standard Garrity Warning protecting him from criminal culpability but also warning him that he would be subject to disciplinary action up to and including dismissal if he refused to answer any questions or failed to give truthful answers.

During a second interview conducted in December 2016, Lt. Mullen showed certain documents to the appellant. They included the Resignation of Trustee and the Acceptance of Trustee dated April 15, 2015 and another was Section 5 of the original Trust Agreement entitled Resignation or Removal of Trustee which outlined what would happen in the event of the grantor's death,

incapacity or resignation. Section 5 provided that in any of those circumstances, the successor trustee, the appellant, *"shall be vested with all the duties, rights, titles, and powers, whether discretionary or otherwise, as if originally named as trustee."*

Lt. Mullen then showed the appellant a copy of an email which the appellant sent to Attorney Dorcas Gordon on April 9, 2015 that read, *"Hi, Dorcas. Thank you for all your help the other day. I have since spoken to Marcia regarding changing me to the Trustee and even talked to her about making it irrevocable and she appears to be all for it. I've talked to her in length about it on 3 occasions and she hasn't changed her mind. Could you please advise if this is possible, what is required and what your availability is to do it? Mike."* Lt. Mullen concluded that the intent of this message clearly demonstrated the appellant's intention to become the trustee. Attorney Gordon replied that the process of having the grantor resign as trustee and having the appellant accept that role would be fairly simple but advised against converting the trust to an irrevocable one for tax and other reasons.

Lt. Mullen then showed the appellant a copy of another email the appellant sent to Attorney Gordon on April 13, 2015 that read, *"Hello Dorcas. I visited Marcia on Sunday and talked to her in great detail about removing her as Trustee and making it irrevocable. She decided she wants to do this. Can you draft up the required paperwork and we can meet this Wednesday at 2:30? (sic)." Lt. Mullen concluded that these messages clearly indicated that the appellant was engaged in an ongoing effort to have his aunt resign as trustee.*

Lt. Mullen then showed the appellant a copy of another email that Attorney Gordon sent to the appellant on April 14, 2015 that read *"Yes I will plan to meet with Marcia tomorrow at 2:30 at her place and will bring with me the documents for her to resign as trustee and for you to accept the position as trustee of her trust."* Lt. Mullen concluded that the purpose of this message was for Marcia Gamache to resign and for the appellant to accept the role of trustee.

Lt. Mullen also showed the appellant a document entitled Resignation of Trustee signed by Marcia Gamache on April 15, 2015 and another document entitled Acceptance of Trustee also signed by the appellant on April 15, 2015. Upon viewing the email messages and the two documents the appellant claimed to have no recollection of their existence. Lt. Mullen also provided the appellant with an April 16, 2015 email the appellant sent to an executive officer at Meredith Village that read *"Hi Tamara. Attorney Gordon will be forwarding you an update to Marcia's trust. Thanks, Mike."* The executive acknowledged receipt of the documents and updated the bank's records.

Lt. Mullen then showed the appellant a copy of another email that Attorney Gordon sent to a banking executive at Meredith Village with a copy to the appellant on April 16, 2015 that read *"I write to advise you that Marcia W. Gamache has resigned as Trustee of the above-referenced Trust; and the named Successor Trustee, Michael D. Feinauer, has accepted and assumed the role of trustee. From this point forward, any action taken relative to accounts and funds held in the above referenced Trust needs to be authorize by Trustee Michael D. Feinauer."*

Lt. Mullen then met with Attorney Gordon and shared with her the appellant's denial of the existence of the messages and the changes in trustees. Attorney Gordon expressed surprise at the appellant's statements and stated clearly that the appellant was the trustee of his aunt's trust and that he was present when the Resignation of Trustee and Acceptance of Trustee documents were signed by each of them. Attorney Gordon explained that after the documents were signed the terms successor trustee and trustee became interchangeable as they were held by the same person, the appellant, who then assumed all the fiduciary duties and responsibilities as the trustee as well as control over the trust. Lt. Mullen told the appellant that he could not see how this concept was foreign to him since it was clearly explained in Article 5 of the 11th amendment. Lt. Mullen also wanted to clarify the issue with Meredith Village but the appellant refused to authorize personnel from Meredith Village to speak with Lt. Mullen.

On May 24, 2017, Lt. Mullen spoke with Mr. D'Italia at Franklin Savings. Mr. D'Italia believed that Marcia Gamache was still the trustee until Lt. Mullen showed him the Resignation and Acceptance documents which Mr. D'Italia said he had never seen before. For unexplained reasons, these two documents were not transferred along with the trust documents, assets and accounts from Meredith Village to Franklin Savings. Lt. Mullen testified that he also showed Mr. D'Italia the Resignation and Acceptance documents after which Mr. D'Italia agreed that the appellant was the trustee.

Lt. Mullen concluded, based on the emails, interviews, and documents, that the appellant intended all along to take over as trustee and that he planned Ms. Gamache's resignation and his acceptance of the role of trustee. Lt. Mullen flatly dismissed the appellant's claim of ignorance of the events and records which contradicted the appellant's claim. Lt. Mullen and his superiors characterized the appellant's representations including the "yellow letter" as deceptive and obstructive to the investigation and for these reasons they recommended disciplinary action. On January 11, 2018, Col. Wagner dismissed the appellant from state service for lack of integrity in violation of the professional conduct standards.

The appellant conducted much of his personal business during work hours and through the state email system in violation of the computer use agreement which he signed. His use of the state's email system was accessible and viewable by authorized state investigators. At the hearing, all the witnesses testified that the appellant's use of the state's email system as well as his running personal errands while on duty would not have resulted in a recommendation for termination.

CONCLUSIONS OF LAW

The Board concludes that the appellant failed to sustain his burden of proof and to establish by a preponderance of the evidence that the dismissal was unjust, unlawful, or unwarranted by the facts. Per-A 207.12. The Board reached this conclusion in reliance upon the following facts.

The grantor of the trust, Marcia Gamache, was a childless widow with significant financial assets held in trust for her care and comfort. The trust funded the checking account she held jointly with her nephew, the appellant, which paid her bills each month. The appellant was the sole beneficiary in her will, held a DPOA in the event of her incapacity, and was named the successor trustee of the trust on December 17, 2014 after her return to New Hampshire. He had a copy of the original Trust Agreement as amended from time to time. He received his aunt's monthly statements from the Fidelity brokerage service and could see how the investments were performing.

On April 9, 2015, the appellant contacted Attorney Gordon about changing the trusteeship from his aunt to himself and said that he discussed the change at length with his aunt three times and that his aunt was agreeable to the change. This message demonstrates the appellant's intent to orchestrate the change in trustees. On April 13, 2015, the appellant contacted Attorney Gordon again to tell her that he had discussed the proposed change with his aunt again and that they would like to schedule a time to sign the necessary documents. This message also demonstrates the appellant's role in effectuating the change of trustees. Attorney Gordon replied on April 14, 2015 that she would bring the documents to Ms. Gamache's residence the next day for both of them to sign. The purpose of the meeting was for the aunt to resign as trustee and for the appellant to become the trustee for all intents and purposes.

In the afternoon of April 15, 2015 Ms. Gamache signed the Resignation of Trustee and the appellant signed the Acceptance of Trustee in the presence of Attorney Gordon. The following day, April 16, 2015, the appellant contacted Meredith Village personnel to inform them that Attorney Gordon would be forwarding the documents that changed the trusteeship. This message demonstrates that the appellant was involved in the process to make sure that the change was recorded and effective.

In the Fall of 2015, an officer of Meredith Village alerted state authorities about the appellant's depletion of the joint checking account that jeopardized Ms. Gamache's ability to pay her bills. The appellant subsequently obtained Ms. Gamache's consent to move the funds from Meredith Village to Franklin Savings but a copy of the Resignation of Trustee and Acceptance of Trustee documents were not included in the transfer of documents and funds.

When DOJ attorneys and investigators interviewed the appellant in January 2016, he denied any knowledge of the change in trustee despite the documentary evidence to the contrary. DOJ staff concluded that he lied to them. In August 2016, they sent their findings to DOS and recommended that DOS place his name on the EEL due to his lack of credibility.

DOS opened its own investigation in September 2016 and asked the appellant to explain his actions. In his written statement the appellant again denied any knowledge of the change in trustees and control over the trust despite having the specific issue identified for him to consider. During a second interview in December 2016 Lt. Mullen showed the appellant copies of the email messages between the appellant and attorney Gordon and officers at Meredith

Village as well as copies of Article 5 of the Trust Agreement and the Resignation of Trustee and Acceptance of Trustee documents all of which demonstrated that the appellant orchestrated the change to take over the duties of trustee and control over the assets but the appellant remained steadfast in his denial of any knowledge of the changes. The Board found it incredulous that he had no recollection of the email messages that he sent or of such important documents that he signed. His refusal to authorize Lt. Mullen to speak with the officers at Meredith Village and to view the transactional records convinced the Board that the appellant did know what he was doing and why. Those Meredith Village officers sounded the alarm about the appellant's depletion of the trust assets that jeopardized his aunt's care and comfort at Taylor Community.

When Lt. Mullen began his investigation, the appellant was apprised of exactly what the disciplinary inquiry was about: an allegation that he was untruthful about his status as the trustee of Ms. Gamache's trust and her resignation as trustee of the trust during the DOJ investigation. The appellant made clear his understanding of the specific issue in his "yellow letter" to Lt. Mullen. Based on his understanding of the specific false statement he was accused of making, the appellant testified that he contacted Mr. D'Italia prior to his interview with Lt. Mullen to verify that his aunt was still the trustee. However, he admitted that he did not contact Attorney Gordon who would have been the obvious best source of definitive information about his and his aunt's status and roles in the trust.

The Board did not find the appellant's testimony on this point to be credible and concluded that the appellant was seeking plausible deniability by only contacting Mr. D'Italia, who the appellant would have reason to know was not fully informed about the April 15, 2015 changes to the trust. Moreover, the appellant testified, for the first time in the entire course of this matter, that he had also contacted Mr. D'Italia about this issue prior to his interview with DOJ attorneys and investigators at a time when the appellant's status as trustee versus successor trustee was not known at that moment to be an issue. The Board determined that this testimony was an even less credible effort to create plausible deniability by the appellant.

The Board found that Lt. Mullen correctly concluded that the appellant was not truthful during the investigation. Lt. Mullen properly referred his findings and conclusions to Col. Wagner who gave the appellant the opportunity to meet and refute the finding of dishonesty. The appellant declined that opportunity. Col. Wagner read the investigative report and concluded that the appellant violated the integrity provisions of the Professional Standards of Conduct and terminated the appellant's employment on January 11, 2018.

In light of the Board's decision today, the other issues of computer policy violation and theft of electronic services are rendered moot and the Board does not address them.

The Board considered the appellant's Proposed Findings of Fact and Conclusions of Law and rules as follows on each one of them:

REQUESTS FOR FINDINGS OF FACT

A. BACKGROUND

1. Trooper Michael Feinauer (hereinafter "Mike") was hired as a probationary trooper on December 17, 2004. Testimony Mike.

GRANTED

2. Mike was promoted to the permanent position of Police Trooper I on December 17, 2005. Testimony Mike.

GRANTED

3. Mike was assigned to various troop areas by the State of New Hampshire, Department of Safety, Division of State Police (hereinafter "State"). Testimony Mike.

GRANTED

4. These included an assignment to Troop A, covering Strafford and Rockingham County; Troop D, covering Merrimack County; the Special Enforcements Unit; and Troop G. Testimony Mike.

GRANTED

5. Members of Troop G have state-wide jurisdiction and may patrol anywhere in the State, provided they are not assigned to a specific area. Testimony Mike.

GRANTED

6. Troop G is distinct from other troops in that their primary purpose is to enforce Federal motor carrier rules, dealer and inspection rules and laws. Testimony Mike.

GRANTED

7. Members of Troop G are also assigned to enforce laws governing State certified driving education instructors. Testimony Mike.

GRANTED

8. Mike was assigned to Troop G on or about 2013. Testimony Mike.

GRANTED

9. During his tenure, Mike was primarily responsible for enforcing Federal motor carrier safety rules and regulations and State laws. Testimony Mike.

GRANTED

10. Mike investigated crashes involving motor vehicles and also performed routine patrols and other duties of a trooper. Testimony Mike.

GRANTED

11. During his tenure at Troop G, Mike received either satisfactory or above satisfactory in all performance criteria in his annual performance evaluation. See, Appellant Exhibits 2, 3 and 4.

GRANTED

12. Mike received numerous commendations during his tenure with the State Police, including but not limited to, a Life Saving Award presented on September 26, 2014; an Official Commendation in 2011 by Colonel Quinn; a Life Saving Award in 2011; and a Congressional Law Enforcement Award in 2011. Testimony Mike; Appellant Exhibit 8 and 9.

GRANTED

13. On January 14, 2014, Marcia W. Gamache issued a Durable Power of Attorney in favor of Mike. See, Appellant Exhibit 1.

GRANTED

14. Marcia W. Gamache (hereinafter "Marcia") was the aunt of Mike. Testimony Mike.

GRANTED

15. Mike and Marcia had a very close relationship and Mike acted as her caretaker and handled her financial affairs since 2005. Testimony Mike.

GRANTED

16. On December 17, 2014, Marcia issued the Eleventh Amendment to and Restatement of Trust Agreement between Marcia W. Gamache, Grantor and Marcia W. Gamache, Trustee of The Marcia W. Gamache Trust Agreement (hereinafter "Trust Agreement"). See, State Exhibit 1, Attachment 4 at Bates (hereinafter "BS") 167-172.

GRANTED

17. Mike was the sole named beneficiary in the Trust. Id. at p. 169.

GRANTED

18. Mike was also the so-called Successor Trustee of the Trust. See, BS 169.

GRANTED

19. Upon her death, all of Marcia's property (less debts and taxes) went to the Gamache Trust. See, BS 163.

GRANTED

20. Mike was executor of Marcia's will. Testimony Mike; BS 164.

GRANTED

21. Attorney Dorcas Gordon of Wescott Law Office was the attorney for Mike and created an estate plan for his family. Testimony Mike.

GRANTED

22. In October of 2015, Attorney Gordon informed Mike that he was going to be investigated by the New Hampshire Attorney General's Office concerning his relationship with Marcia.

GRANTED

B. THE TRANSFER OF ASSETS

23. Thereafter, after being informed that he was under investigation, Mike immediately reported this investigation to his supervisor, Staff Sergeant Boothby. Testimony Mike.

GRANTED

24. Marcia transferred joint bank accounts from Meredith Village Savings Bank to Franklin Savings Bank. See, BS 41 at ¶18.

DENIED. The record taken as a whole reflected that, while Marcia signed the paperwork, Appellant played an instrumental role in causing the transfer to occur.

25. On October 2, 2015, Marcia transferred the assets of the Marcia W. Gamache Trust from MillRiver Wealth Management, LLC to Independent Financial Advisors. BS 226; Testimony Luca D'Italia.

DENIED. The record taken as a whole reflected that, while Marcia signed the paperwork, Appellant played an instrumental role in causing the transfer to occur.

26. In October of 2015, Attorney Gordon informed Mike that he was under investigation by the Attorney General's Office for elder abuse. Testimony Mike.

DENIED – Mr. Aiken from Meredith Village Bank contacted Attorney Gordon as well as BEAS and DOJ in the fall of 2015 and Attorney Gordon called the appellant for an explanation.

27. Mike contacted Luca D'Italia and inquired as to who was Trustee of the account and was informed that Marcia Gamache was the Trustee. Testimony Mike.

DENIED. The Board did not find this testimony credible.

28. Soon after Marcia transferred the assets from MillRiver Wealth Management, LLC to Independent Financial Advisors, a disgruntled employee filed an elder abuse charge against Mike. Testimony Mike.

GRANTED IN PART AND DENIED IN PART. The Board does not agree with the characterization of the bank employee as "disgruntled;" however, it does agree that an employee of MillRiver Wealth Management, LLC filed an elder abuse charge against Mike.

29. Franklin Savings Bank never had a checking account for the Gamache Trust. Testimony Mike.

GRANTED

C. THE ATTORNEY GENERAL INVESTIGATION

30. On January 29, 2016, the New Hampshire Attorney General's Office (hereinafter "NHAGO") continually asked if Mike was the Trustee of the Gamache Trust. Testimony Mike.

GRANTED

31. Mike informed them that he was not the Trustee but Successor Trustee. Testimony Mike.

GRANTED

32. The NHAGO, asked several times if Mike's aunt had resigned as Trustee. Testimony Mike.

GRANTED

33. Mike informed NHAGO that he did know if his aunt has resigned. Testimony Mike.

GRANTED

34. Mike had informed the NHAGO that he was sure of this, as he had recently contact Mr. D'Italia of Independent Financial Advisors (a company of Franklin Savings Bank) and was informed that Marcia was Trustee. Testimony Mike.

DENIED. The Board did not find Appellant's testimony that he had contacted Mr. D'Italia prior to his meeting with the NHAGO to be credible.

35. The NHAGO never charged Mike with a crime, indicted him for a crime, or arrested him for a crime, or convicted him of a crime. In fact, the NHAGO determined that it would not pursue any criminal charges in this matter. See, BS 699 and 700.

GRANTED

36. Mike admitted that Marcia had been very generous to him over the years. Testimony Mike. BS 141-142

GRANTED

37. On August 18, 2016, the NHAGO, by and through Lisa Wolford, made a complaint against Mike that he had been untruthful in 2 ways. One was that Mike did not identify himself as the Trustee of the Gamache Trust and that he did know that Marcia had resigned as Trustee. See, BS 137.

GRANTED

D. REVIEW OF DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

38. In Lieutenant Mullen's final report dated June 5, 2017, Lieutenant Mullen found that, "the investigation into this matter revealed that on 10/2/15, Marcia Gamache transferred the Trust from the Meredith Village Savings Bank to the Franklin Savings Bank." BS 42.

GRANTED

39. In an official report to the NHAGO, Richard C. Tracy found that, "...Feinauer moved the trust accounts from Meredith Village Savings to Franklin Savings, ..." BS 140.

GRANTED

40. Richard Tracy made a mistake of fact in his official report to the NHAGO dated February 1, 2016 when he attributed the movement of funds from the Meredith Village Savings to Franklin Savings Bank to Mike.

DENIED. The record as a whole reflected that appellant was instrumental in causing the transfer of funds to occur.

41. In his official report to the NHAGO dated February 1, 2016, Richard Tracy made a mistake of fact when he said, "Barnstead is in Troop A." Barnstead is in fact located in Troop E. Testimony Mike.

GRANTED

42. Marcia Gamache did not have any accounts at Bank of America. Testimony Mike.

GRANTED IN PART AND DENIED IN PART. The Board's recollection of the testimony is that Marcia Gamache at one time had an account or accounts with Bank of America, but closed those accounts upon her return to New Hampshire, and transferred her assets from those accounts to Meredith Village Savings Bank. It would be accurate to say she did not have any bank accounts with Bank of America at any time relevant to the inquiries in this case.

43. On August 30, 2016, The State requested that Mike provide a written explanation of his interview with the NHAGO. See, BS 157.

GRANTED

44. As a result, on September 8, 2016, Mike provided the explanation in a so-called "yellow letter". Before he wrote this letter, Attorney Eric Wilson called Mr. D'Italia, with Mike present, and asked who the Trustee of the Trust was at the present time. Mr. D'Italia told him that Marcia was the Trustee and he was the Successor Trustee. Testimony Mike. Testimony Wilson.

GRANTED

45. In the September 8, 2016 "yellow letter" Mike informed the State that he did not believe he was Trustee and did not believe that Marcia had resigned as Trustee. See, BS 159-160.

GRANTED

46. Mike, in his September 8, 2016 correspondence to the State, informed them that he had the Durable Power of Attorney that Marcia executed in his favor, which allows him to arrange for payments and her related care. See, BS 159.

GRANTED

47. At this time, the State did not produce, for either Eric Wilson or Mike, the executed Resignation of Trustee and Acceptance of Trustee. Testimony Mike.

GRANTED

48. Thereafter, Mike went about his duties as a Trooper in Troop G for a period of approximately three (3) months, when he was requested to attend an interview with Lieutenant Mullen on December 21, 2016. BS 194.

GRANTED

49. Immediately before entering the interview, in the parking lot, Mike contacted Mr. D'Italia to confirm that Marcia was still Trustee of the Gamache Trust. Mr. D'Italia provided said confirmation. Testimony Mike.

GRANTED

50. Prior to commencement of the interview on December 21, 2016, Mike was informed that the sole purpose of the interview was to determine his truthfulness to members of the NHAGO from when interviewed on January 29, 2016. See, *Garrity Warnings*, BS 194.

GRANTED

51. Lieutenant Mullen made it clear that the sole issue for the interview was, "Did Trooper Feinauer provided false information to both the NHAGO and me when he said that he had no idea that he was in charge of the Trust and he had no idea that his aunt had resigned as Trustee." BS at 31.

GRANTED

52. Mike told Lieutenant Mullen he was not Trustee of the Trust and he did not believe Marcia had resigned as Trustee. Testimony Mike.

GRANTED

53. At the December 21, 2016 interview with Lieutenant Mullen, Mike was shown the executed Resignation of Trustee and Acceptance of Trustee for the first time. Testimony Mike.

GRANTED

54. Mike agreed that his signature was on the Acceptance of Trustee, but does not remember signing the document. Mike also did not deny that Marcia had signed the Resignation of Trustee, but did not remember seeing her sign the document. Testimony Mike.

GRANTED

55. Mike was adamant that he did not lie.

GRANTED

56. Lieutenant Mullen admitted he did not know if Mike knew he was trustee on December 21, 2016. "Whether you know it or not, I don't know. But you are the Trustee." Appellant Exhibit #11 Starting at 56 minutes and 4 seconds.

GRANTED IN PART AND DENIED IN PART. Lt. Mullen did make this statement, but the Board concluded it would be a step too far to characterize it as an "admission" regarding the appellant's state of mind.

57. Lieutenant Mullen admitted that whether the Trust was revocable or irrevocable was not relevant to the investigation. Id. Starting at 55 minutes and 23 seconds.

GRANTED

58. Thereafter, during the calendar year 2017, Mike performed his duties as a troop member of Troop G.

GRANTED

59. During the calendar year 2017, Mike was not interviewed by the State nor asked to write a "yellow letter" in regards to any issue.

GRANTED

60. On October 23, 2017, Mike received an overall satisfactory evaluation from his supervisor. Appellant Exhibit 2.

GRANTED

E. POST INTEGRITY INVESTIGATION

61. The investigation concerning Mike for truthfulness with the NHAGO and the Department of Safety was completed on June 5, 2017. BS 20.

GRANTED

62. In his investigation report, Lieutenant Mullen sustained the integrity violation allegation and also the computer use violation of using the State e-mail server for personal business. BS 43 and 44.

GRANTED

63. Thereafter, Lieutenant Mullen conducted a second "secret" investigation to further investigate the use of State computer system by Mike. BS 46-49.

GRANTED IN PART AND DENIED IN PART. This follow-on investigation occurred as a result of DoIT being able to produce the computer usage info that was requested during the initial investigation. This Request implies (i.e, the comment that it was “secret” – it was not) that there was something improper about this part of the investigation, which implication the Board denies.

64. This investigation was completed by Lieutenant Mullen on October 10, 2017. BS 49.

GRANTED

65. Lieutenant Mullen alleged that Mike stole from the State when he visited his aunt on November 12, 2015. BS 47.

GRANTED IN PART AND DENIED IN PART. Lt. Mullen did not “allege” this, he reached this conclusion, based on his investigation.

66. Lieutenant Mullen alleged that Mike violated the computer use policy. BS 48.

GRANTED

67. Lieutenant Mullen did not conduct any interviews concerning the allegation of the computer use violation or Mike visiting his aunt. Testimony Mike.

GRANTED

68. Lieutenant Mullen did not order for a “yellow letter” for the allegations of computer use violation and visiting his aunt. Testimony Mike.

GRANTED

69. Lieutenant Mullen did not interview Mike or Mike’s supervisors in regards to these aforementioned allegations. Testimony Mullen.

GRANTED

70. On November 12, 2015, Mike does not remember the specific date, but reviewed the records and was scheduled to work an eight (8) hour day. See, BS 53.

GRANTED

71. At the time, Mike usually worked from 6:00 a.m. until 2:00 p.m. Testimony Mike.

GRANTED

72. Mike assumes he must have flexed his scheduled pursuant to his supervisor. It was not uncommon to flex hours with a supervisor. Testimony Mike; Testimony Armaganian.

GRANTED

73. November 12, 2015, Mike was scheduled to work 9:00 a.m. to 5:00 p.m. BS 53.

GRANTED

74. Mike was not specifically assigned to an area on November 12, 2015. Testimony Wagner; State Exhibit 5; BS 14.

DENIED. While the testimony reflected that Troopers in Troop G were not necessarily limited to a specific area within the State like other Troops, the Appellant was generally “assigned” and expected to work in the greater New London area.

75. On November 12, 2015, after work, Mike was involved in a motor carrier stop in New London, until approximately 6:00 p.m. See, BS 55.

GRANTED

76. Mike completed his work day and was done patrolling on November 12, 2015 at 8:03 p.m. BS 57.

GRANTED

77. On November 12, 2015, Mike had worked an approximately 11-hour day for the State. See, BS 57.

DENIED. The appellant’s start and end times for the day were approximately 11 hours apart, but he took several hours off to visit with his Aunt.

78. Mike only charged the State for his 8-hour day. Testimony Mike.

GRANTED

79. Mike often worked late and did not put in his time. At one point, one of his supervisors had to pull him off to the side and tell him he had to write his time down, and not to give the State free time. Testimony Mike.

GRANTED

80. Mike was never reprimanded for violating the computer use policy by his supervisor. Testimony Mike; Testimony Armaganian.

GRANTED

81. Mike had some of the highest productivity in Troop G during the years of 2014 through 2018. Testimony Mike; Testimony Armaganian.

GRANTED

82. From September 1, 2014 through December 31, 2015, Mike had 857 motor carrier inspections, with a goal of 500. Appellant Exhibit 4, p. 2.

GRANTED

83. From September 1, 2015 through August 31, 2016, Mike had 571 motor carrier inspections, with a goal of 500. Appellant Exhibit 3, p. 2.

GRANTED

84. Mike did not commit theft against the State on November 12, 2015, as it was current practice for members of Troop G to visit relatives, go to church, have lunch at home or conduct personal business, as the motto was “family first”. It was also part of community policing. Testimony Mike; Testimony Armaganian.

GRANTED. The record reflected that this was accepted practice and that the State suffered no harm.

85. The number of supposed e-mail records contained in the State's investigation is exaggerated and duplicative. See, paragraph 13 of Affidavit of John Mullen.

DENIED. The Board disagrees with the implication that the State intentionally exaggerated the number of personal emails sent by the Appellant (which were significant in number regardless of how calculated) but agrees that the exhibits were duplicative and could have been better organized.

86. An example is a series of e-mails that the NHAGO provided to the State in August of 2016. See, BS 176-180; repeated BS 164-168; repeated BS 64-68; Repeat BS 693-697.

GRANTED

87. The methodology employed by the State exaggerated the number of emails by including the same emails several times. The emails were sorted by InBox, Deleted and Sent. BS 39

DENIED. The Board disagrees with the implication that the State intentionally exaggerated the number of personal emails sent by the Appellant (which were significant in number regardless of how calculated) but agrees that the exhibits were duplicative and could have been better organized.

88. Many times the emails would be in both the InBox and Sent indexes. See BS 566 for Sent and BS 490 for InBox. In addition, by its very nature anything in the Deleted box would have been in the sent or InBox index. See BS 496 and BS 50

GRANTED

F. MIKE'S TUMULTUOUS 2015 AND LEGAL STATUS RENDERING THE STATUS OF TRUSTEE IMMATERIAL

89. The status of Trustee was irrelevant as, a matter of law, to Mike. He already had a Durable Power of Attorney that allowed for him to act in a legal capacity for Marcia. See Appellant 1

DENIED. If the changes were immaterial, it would make no sense for Appellant and his Aunt to have sought them out and insisted that they be made.

90. The Status of Trustee was irrelevant as Mike was Executor of Marcia's Will. BS 164

DENIED. If the changes were immaterial, it would make no sense for Appellant and his Aunt to have sought them out and insisted that they be made.

91. As Mike was Successor Trustee of the Gamache Trust he automatically became Trustee of the Trust if Marcia died or became incapacitated. BS 170

GRANTED

92. Mike was the sole named beneficiary under the Gamache Trust. BS 169

GRANTED

93. Attorney Gordon provided the terms of Successor Trustee and Trustee was interchangeable. BS 49

GRANTED

94. Lieutenant Mullen admits trust is self-sufficient without the need for intervention by Mike. Appellant Exhibit #11 Starting at 37 minutes and 47 seconds.

GRANTED

95. Attorney Gordon did not inform Mike that if Marcia became incapacitated that, as an operation of law, Mike became Trustee.

DENIED. The trust document is plain on this point, and there was no testimony to support this assertion.

96. Mike suffered from a series of personal tragedies in 2015. These included, but are not limited to, A) Being primary wage earner for family and required to work many details to support the family; B) Failure of the State to provide a two labor grade increase for Trooper II (A/K/A "Trooper First Class") in December of 2014. It was not effective until May 26, 2017. Appellant Exhibit #5 C) Mike's father was involuntarily transferred into a nursing home; D) His wife had back surgery incapacitating her for approximately four months; E) Mike was left as the sole caretaker of his wife, their minor child, Marcia, 3 draft horses, 2 saddle horses, hundreds of chickens, 10 goats, 10 ducks, and 4 dogs. Testimony Mike and Appellant Exhibit 10

GRANTED IN PART AND DENIED IN PART. The record reflected that Appellant endured several serious personal tragedies and hardships in 2015. However, it did not necessarily reflect all of the specific incidents set forth in this Request. Moreover, Exhibit 10 was not admitted in to evidence.

97. Mike's mother-in-law filed for bankruptcy. Id.

GRANTED

98. Mike's father-in-law was hospitalized five times in 2015, passing in March of 2016. Id.

DENIED. The Board did not recall receiving evidence on this specific assertion.

99. Mike's mother was in failing health. Id.

DENIED. The Board did not recall receiving evidence on this specific assertion.

100. Mike worked many details to the point of exhaustion. ID

DENIED. The Board did not recall receiving evidence on this specific assertion. However, the record did reflect that Appellant worked many additional hours that he was not paid for.

101. Mike's friend and colleague was found by Mike, during a wellness check, to having committed suicide in June of 2015 Id.

GRANTED

G. TERMINATION

102. On January 10, 2018, Colonel Wagner relieved Mike of all law enforcement responsibilities. State Exhibit 3 at 7.

GRANTED

103. On January 10, 2018, Colonel Wagner informed Mike that he was to have a pre-disciplinary meeting on January 10, 2018.

GRANTED

104. In the draft disciplinary letter, Mike was informed that he was to be dismissed from State services for three factual allegations. First, the State alleged he had lied to the NHAGO and during his interview by not remembering the execution of documents on April 15, 2016. Second, was because Mike committed "theft" from the State when he visited Marcia on November 15, 2015 and the third was because Mike had allegedly violated the computer use policy by sending personal e-mails on the State server. See, BS. 8.

GRANTED

105. By letter dated January 11, 2018, Mike was informed that he was to be dismissed from State services for three factual allegations. First, the State alleged he had lied to the NHAGO and during his interview by not remembering the execution of documents on April 15, 2016. Second, was because Mike committed "theft" from the State when he visited Marcia on November 15, 2015 and the third was because Mike had allegedly violated the computer use policy by sending personal e-mails on the State server. BS 10-17

GRANTED

II. REQUESTS FOR RULINGS OF LAW

A. STANDARD IN REVIEWING DISCIPLINARY CASES

1. The Personnel Appeals Board (PAB) applies the following Standard in reviewing termination cases.

In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that:

- (1) The disciplinary action was unlawful;
- (2) The appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal;
- (3) The disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence; or
- (4) The disciplinary action was unjust in light of the facts in evidence.

Per-A 207.12(b).

GRANTED

2. "In all cases except as otherwise provided in Per-A 207.12 (e) the burden of proof shall be upon the party making the appeal." Per-A 207.01(a).

GRANTED

B. ADMINISTRATIVE RULE INTERPRETATION

3. "In construing rules, as in construing statutes, where possible, we ascribe the plain and ordinary meanings to words used." Appeal of Flynn, 145 N.H. 422, 423, 764 A.2d 881 (2000). The PAB must look at the rule under consideration as a whole, and not in segments. Appeal of Alley, 137 N.H. 40, 42, 623 A.2d 223 (1993). The agency's interpretation "must be consistent with the language of the regulation and with the purpose which the regulation is intended to serve." Appeal of Donald W. Murdock, 156 N.H. 732 (2008).

GRANTED

4. On appeal, an appointing authority is limited to arguing those reasons for termination raised in its intent to dismiss and dismissal letter. Per 1002.08(d)(e).

GRANTED

C. ALLEGATIONS

5. In terminating Mike's employment the Division of State Police primarily relied on Per 1002.08(b)(7), which authorizes the appointing authority to dismiss an employee without prior warning, for a "violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal;" specifically, PSC Chapter 1 Rules and Regulations; Section 1.13.0 Discipline, which states, "[a]ny Division Member found

to have violated any provision of these Rules and Regulations may be subject to disciplinary action, up to and including dismissal from the Division of State Police.”

See State Exhibit 5.

GRANTED

6. The termination letter that was issued then enumerates seven specific offenses the Division found Mike had allegedly violated:

- (a) Section 1.11.0 Obligations, Sub-section 1.11.2 Personal Behavior;
- (b) Section 1.4.0 Obligations, Sub-section 1.4.8 Integrity;
- (c) Section 1.13.0 Discipline
- (d) Per 1002.08(b)(5) Theft of valuable goods or services from the state or from any other employee or individual served by the agency;
- (e) Per 1002.08(b)(7) Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal;
- (f) Per 1002.08(b)(10) Obstructing an internal investigation;
- (g) Per 1002.08(b)(26) Repeated unauthorized use or gross misuse of information or communication systems; BS 15-17.

GRANTED

7. However, these allegations may be qualified into three areas of inquiry: (1) alleged integrity issues; (2) alleged violations of “theft” for visiting his Aunt on November 15, 2015; and (3) alleged excessive abuse of the email system. State Ex. 5.

GRANTED

D. MIKE PROVIDED HONEST AND TRUTHFUL ANSWERS DURING THE INTERNAL INVESTIGATION INTERVIEW

8. It was alleged that Mike engaged in two (2) intentional acts in violation of Chapter 1 Rules and Regulations, Section 1.4.0 Obligations, subsection 1.4.8 Integrity, which provides,

“No Division Member shall under any circumstances make any false official statement or intentional misrepresentation of facts. Any Division Member who becomes aware that another Division Member has made a false statement or intentional misrepresentation of facts shall, without delay, inform his or her Commanding Officer. Any Division Member, who becomes aware that any person has provided false information to a superior, shall inform the superior as soon as possible.”

See Chapter 1 Rules and Regulations, Section 1.4.0 Obligations, subsection 1.4.8 Integrity. The two alleged intentional violations were that Mike was untruthful during the investigations with the NHAGO and Lt Mullen when he informed them that he was not and did not remember being made the Trustee of the Gamache Trust and that Marcia had resigned as Trustee of the Gamache Trust.

GRANTED

9. Mike did not make any false official statement or intentional misrepresentation of facts during the investigation of this matter. PSC Section 1.40 Subsection 1.4.8.

DENIED. The record as a whole reflected that Appellant was not credible and not honest as to the factual assertions he made during the Department of Safety's internal investigation, at a minimum.

10. Mike did not violate a posted or published agency policy or procedure, the text of which warns that a violation may result in dismissal. See, Per 1002.08(b)(7).

DENIED. The record as a whole reflected that Appellant was not credible and not honest as to the factual assertions he made during the Department of Safety's internal investigation, at a minimum. His termination was therefore permissible pursuant to Per 1002.08(b)(7) and the Department of Safety's internal rules including PSC Section 1.40, Subsection 1.4.8.

11. Mike did not make any false official statement or intentional misrepresentation of fact to his supervisors. PSC Chapter 1 Section 1.4.8.

DENIED. The record as a whole reflected that Appellant was not credible and not honest as to the factual assertions he made during the Department of Safety's internal investigation, at a minimum.

12. Mike did not obstruct an internal investigation. Per 1002.08(10).

DENIED. The record reflected that Appellant was not fully honest nor fully cooperative during the internal investigation.

13. In order for an individual to be guilty of lying or perjury, the person must make an intentional false material statement that he does not believe to be true. See, RSA 641:1, Professional Standards of Conduct, Chapter 1, Section 1.40, Sub-section 1.4.8.

GRANTED

14. The designation of trustee was immaterial as Mike already had a Durable Power of Attorney that had existed since January of 2014. Appellant Exhibit 1.

DENIED. If the designation was immaterial the Appellant would not have insisted on the change.

15. Mike did not lie. Mike made a mistake of fact, not a lie, when he told the NHAGO that he was not Trustee.

DENIED

16. Mike did not violate Professional Standards of Conduct, Chapter 1, Section 1.40, Sub-section 1.4.8.

DENIED

17. Every mistake of fact is not an intentional lie. Appeal of Michael Feinauer, PAB Docket No. 2018-T-010, Order on Motion for Summary Disposition dated August 3, 2020.

GRANTED

18. Mike did not intentionally lie to Lieutenant Mullen on December 21, 2016.

DENIED

19. Mike did not violate Per 1002.08(b)(5).

GRANTED

20. Mike did not violate Per 1002.08(b)(7).

DENIED

21. Mike did not violate Per 1002.08(b)(10).

DENIED

22. Mike did not violate Per 1002.08(b)(26).

DENIED

23. Mike did violate Per 1002.04 in that (b)(a) which provides, "an appointing authority may issue a written warning to an employee for unsatisfactory work performance or conduct including, but not limited to the following...(8) Unauthorized use or misuse of information or communication system."

GRANTED

24. Mike did not violate Section 1.11.0 Obligations, Sub-section 1.11.2 Personal Behavior.

DENIED

E. CONCLUSION

25. The decision to dismiss Mike was unjust in light of the facts and evidence. Per-A 207.12(b)(4).

DENIED. The record as a whole reflected that Appellant was not credible and not honest as to the factual assertions he made during the Department of Safety's internal investigation, at a minimum.

26. The termination of Mike was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence. Per 1002.04(b)(11).

DENIED

27. Mike shall be reinstated without loss of pay, provided that the "sum shall be equal to the income loss suffered during the period of denied compensation less any amount of compensation earned or benefits received from other sources". RSA 21-I:58.

DENIED

28. The Department of Safety, Division of State Police shall remove the draft dismissal letter (State Exhibit 2); intent to dismiss letter (State Exhibit 3); the relieved from duty letter (State Exhibit 4) and the termination letter dated January 11, 2018, from Mike's personnel file.

DENIED

29. The Department of Safety, Division of State Police shall remove from Mike's personnel file any negative reference concerning these allegations and issue a corrective letter stating that Mike was not untruthful when he did not remember the events of April 15, 2015; and was truthful to the NHAGO on January 29, 2016 and Lt Mullen on December 21, 2016.

DENIED

30. Mike's discipline is reduce to a written warning for a violation of Per. 1002.04 (b)(8).

DENIED

31. The Appeal of Michael Feinauer is GRANTED.

DENIED

For the Board:



Norm Patenaude



Gail Wilson



Marilee Nihan



Jason R.L. Major

9/23/20